IN THE

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1897.

ARKANSAS BUILDING AND LOAN ASSOCIATION, Perpetual,
Appellant,

No. 650. ***vs.***

J. W. MADDEN, Secretary of State,
Appellee.

Appealed from the U. S. Circuit Court for the Western District of Texas, Holding Session at Austin, Texas.

(This case questions the validity of an Act of the Legislature of the State of Texas, approved May 15, 1897, imposing a heavier franchise tax on foreign than on domestic corporations of the same class.)

BRIEF OF APPELLANT,

By PRUIT & SMITH, SOLICITORS FOR APPELLANT,
Residence, FORT WORTH, TEXAS.

STATEMENT OF THE CASE.

The appellant, The Arkansas Building & Loan Association, a foreign corporation, filed a bill in the U. S. Circuit court for the Western Judicial District of Texas against the defendant, J. W. Madden, Secretary of State of Texas, to enjoin him from collecting a franchise tax of appellant imposed on foreign corporations

by an act of the legislature of Texas, approved May 15, 1897, and to restrain him from forfeiting or declaring forfeited appellant's permit or contract to carry on its business in Texas, procured of the State before the passage of said Act, as such would cause irreparable injury to appellant. Said Act imposes a heavier tax on foreign corporations than on domestic corporations of the same class, and therefore is void for the following reasons, to-wit:

1st. Said Act is repugnant to Art. VIII of the Constitution of Texas requiring all taxation to be equal and uniform on all persons, natural or artificial.

2nd. The same is repugnant to the 14th amendment of the National Constitution which prescribes no state shall "deny to any person within its jurisdiction the equal protection of the law."

3d. Appellant being engaged in interstate commerce, the Act is repugnant to the commerce clause of the Federal Constitution.

4th. Said Act is repugnant to the contract clause of the National Constitution.

5th. The same deprives appellant of due process of law, and therefore is also repugnant to said 14th amendment (R. 1.)

The appellee who was respondent below demurred to the bill: 1st, for the want of equity therein; 2nd, that complainant would sustain irreparable injury was not shown; and 3d, that the Act in question was valid (R. 12)

The court rendered a final decree sustaining the first and third demurrers and overruling the second, holding that the Act in question was valid, and that the appellee had the right to collect the tax imposed thereby, and to forfeit appellant's permit in the manner prescribed by said Act as a penalty for failure to pay said tax (R. 14).

As the case was tried on bill and demurrers, the facts in the bill being properly verified, all allegations of facts therein are admitted to be true, and, to enable the court to have a clear conception of the case, we give the substance of

THE BILL.

"Your orator, The Arkansas Building & Loan Association, Perpetual, sues J. W. Madden, and represents that:

"1. Your orator is a corporation duly chartered and organized under and by virtue of the laws of the State of Arkansas; that it is a citizen and resident of said State of Arkansas: that its principal office and domicile is in the city of Little Rock, in said State. That the defendant is a citizen of the State of Texas, and a resident of the county of Houston, and is and was on the dates herein set out the duly qualified and acting Secretary of State of the State of Texas.

2. That your orator is and was at the dates hereinafter mentioned a building and loan association with an authorized capital stock of to-wit: the sum of two and one-half million dollars ($2,500,000); that its assets at present exceed the sum of nine hundred thousand dollars ($900,000). That your orator is now, and has been since

the 24th day of July, 1896, engaged in interstate commerce and intercourse with the citizens of Texas, in loaning its money made and accumulated in the said State of Arkansas to the citizens of Texas, and accepting real estate securities therefor.

That on the 24th day of July, 1896, your orator accepted the invitation of the State of Texas extended to foreign corporations in general, as specified in the Act of the 21st legislature of the State of Texas, approved April 3, 1889, inviting and authorizing foreign corporations to obtain permits to do business in the State of Texas; and on said day, to-wit: the 24th day of July, 1896, your orator filed a copy of its said charter with the Secretary of State, and paid the State of Texas the sum of two hundred dollars ($200) in cash; and procured of the State of Texas on said date a permit to carry on and do business in the State of Texas as a foreign building and loan association, as aforesaid, for and during the period of ten years next after said date. That thereby your orator acquired vested rights to do business in this State, as aforesaid, and became thereby entitled to the equal protection of the laws.

That on said 24th day of July, 1896, your orator paid the State of Texas the sum of ten dollars ($10) as a franchise tax for the year beginning on said date, thereby complying with the said Act imposing said franchise tax of ten dollars ($10) on all corporations of whatsoever nature, both foreign and domestic, doing business in this State.

3. That on, to-wit: July 17, 1897, your orator sent ten dollars ($10) to defendant, J. W. Madden, to pay said franchise tax on your orator's company as required by said Act of 1893, for the year ending the 24th day of July, 1898.

That on, to-wit: July 20, 1897, the defendant, as Secretary of State, as aforesaid, received said $10, and willfully refused to accept said sum in payment of said franchise tax for said year. That defendant, in his official capacity on the last mentioned date, as aforesaid, willfully, wrongfully and illegally demanded of your orator the oxorbitant sum of two hundred and five dollars ($205) in payment of its franchise tax in this State for the year beginning July 24, 1897, and then and there refused to accept any less sum of money of your orator in payment of your orator's franchise tax.

4. The said defendant, in exacting said sum of $205, was wrongfully endeavoring to enforce a certain Act of the legislature approved on May 15, 1897; said Act took effect from its passage.

That said Act does impose said tax of $205 on all foreign corporations which have an authorized capital stock of two and one-half million dollars ($2,500,000). That the tax thereby imposed on all domestic corporations is much less than the tax imposed on all foreign corporations of the same authorized capital stock and class. That the tax imposed by said Act on domestic corporations with the same authorized capital stock as your orator, and of the same class, is only $50 per annum. That said Act further provides that "Any corporation, either domestic or foreign, which

shall fail to pay the tax provided for in this article at the time specified herein, shall, because of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated without judicial ascertainment by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations, the word "forfeited," giving the date of such forfeiture, and any corporation whose right to do business may be thus forfeited, shall be denied the right to sue or defend in any of the courts of this State; and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such defendant corporation ....."

That said Act grossly discriminates against foreign corporations and in favor of domestic corporations, as aforesaid, and is therefore a species of class legislation; and is therefore not only obnoxious and repugnant to sections 1 and 2 of article VIII of the Constitution of Texas requiring all taxes of whatsoever nature to be equal and uniform on all persons, whether natural or artificial, but is also obnoxious and repugnant to the commerce clause of the Constitution of the United States, as well as to section 1 of the 14th amendment to the Constitution of the United States, which prescribes that no State shall "Deny to any person within its jurisdiction the equal protection of the law." That by reason of the premises said Act is null and void as to your orator and all foreign corporations, who, like your orator, had prior to said Act obtained permits to do business in this State for the period of ten years under the Act of April 3, 1889.

5. That since your orator procured its said permit to do business in this State, it had, in good faith, and prior to the passage of said Act, loaned the sum of $51,800 to L. J. Weltman, a resident and citizen of Fort Worth, Tarrant county, Texas, and to thirty other residents and citizens of the State of Texas. That your orator now holds non-negotiable notes executed by the said thirty-one borrowers, as aforesaid, secured by liens on real estate situated in the State of Texas. That each of said notes bear interest at the rate of ten per cent per annum, payable monthly to your orator at its said home office, and that each of said borrowers hold stock of the face value of the amount of their respective loans. That said stock is by the terms thereof to be paid for by the said stockholders at the rate of fifteen cents per month on each share of the value of $25. That by the terms of said loan obligations and said stock, when the said stock becomes worth par by the profits of the corporation and the amount paid thereon, then said loan obligations are to be canceled. Each of said loan obligations provides that in case of default in the payment of stock dues or interest on said loan obligations by the said borrowers for the period of three months, then said loan obligation shall, at the option of your orator, mature.

That your orator has sold a great amount of its stock as an investment to many other citizens of the State of Texas, besides said borrowers, to be paid for as aforesaid. That all of said citizens

purchased and are holding said stock in good faith, relying upon your orator's right to do business and to continue its business in the State of Texas, under and by virtue of its said contract, as aforesaid, procured from the State of Texas.

That your orator is desirous of complying with all the valid laws of the State of Texas, and to continue to do business in this State; and is ready and willing, and hereby tenders into this court, the sum of ten dollars ($10) in payment of its franchise tax for the year beginning July 24, 1897.

6. That said defendant, claiming to act in his said official capacity, has, since the 24th day of July last, wrongfully and willfully threatened to declare forfeited your orator's said permit and contract to carry on its business in this State as aforesaid, under and by virtue of and as specified in said Act of May 15, 1897. That said defendant on to-wit: the day of August, 1897, sent your orator a written demand, demanding of your orator the said sum of $205 in payment of its franchise tax under said Act for said year; and also said written demand contained the penalty prescribed by said Act, stating that if said tax was not paid, your orator's permit would be forfeited by defendant.

That since said date and recently the defendant has sent your orator two circular letters at its home office, exacting said illegal tax of your orator, and threatening to forfeit your orator's permit as specified in said Act.

That your orator has every reason to believe and does believe by reason of the premises, and therefore charges that it stands in imminent danger of having its said permit to do business in this State wrongfully declared forfeited by the said defendant, the said Secretary of State, immediately, under and by virtue of and in accordance with said Act of May 15, 1897.

That said threats of said defendant, if carried into execution by him, will imperil all your orators said loan obligations in Texas, as aforesaid, and will occasion a multiplicity of suits by and against your orator in endeavoring to enforce and protect its said loans or to defend the same against suits by said borrowers. As soon as defendant carries into effect his said threats, the said borrowers will necessarily cease to carry out their contracts, and will necessarily cease to pay their monthly dues as aforesaid, on said obligations; because said illegal Act provides that when your orator's permit and right to do business in this State has been declared forfeited as aforesaid, it, your orator, shall have no right whatever to bring suit on any action or for any cause in this State, nor to defend any action brought against it; and thereby all your orators rights in this State, and its demands against said borrowers, and its securities for such demands will be imperiled, if not wholly destroyed.

That the profits of your orator will necessarily thereby be greatly diminished, and each and all of the stockholders of your orator will sustain great and irreparable loss by reason of the premises, and that your orator will sustain irreparable mischief

to its franchises. That your orator's said permit and contract from this state to do business herein will be clouded and made to appear illegal, and that all the capital stock of your orator will be greatly lessoned in value; and that it will necessarily compel your orator to suspend its business in this State, and finally to cease doing business in this State; and that your orator's good name and business standing, by reason of the premises, will be brought into disrepute and odium in the State of Arkansas, where all its assets are and its business is transacted, except that in Texas, as aforesaid, it will sustain irreparable loss in the future sale of its stock and carrying on of its business, and its franchises will be clouded. That by reason of the premises your orator's injury and damage will be irreparable and incapable of ascertainment, and will exceed the sum and amount of $25,000.

That your orator, by reason of the premises, will sustain irreparable loss and damage. That your orator has no legal remedy to thwart the impending peril or to compensate it for the irreparable damage that would necessarily follow the wrongful acts of defendant complained of herein, by reason of the premises."

The bill contains the usual prayer for restraining orders and injunction (R. 1).

THE ANSWER OF THE DEFENDANT.

"1. Said bill of complaint shows upon its face that the complainant is not entitled to the relief therein prayed for, and states no cause of action against respondent.

2. Said bill of complaint is insufficient to warrant the issuance of a writ of injunction, because the same fails to show irreparable injury, and upon its face discloses that complainant has an adequate remedy at law.

3. Said bill of complaint shows upon its face that the amount demanded by respondent as Secretary of State, is the true amount due by complainant, and that such demand is made in compliance with a valid existing law of the State of Texas." (Record, p. 12)

The facts in this case, briefly stated, show that on the 24th day of July, 1896, appellant paid the State of Texas the sum of $10 as its franchise tax for the year beginning on said date, and that on July 17, 1897, after the passage of said act in question, it tendered to the Secretary of State, appellee, the sum of $10 as its franchise tax for the year beginning on the 24th day of July, 1897. The appellee refused to accept said sum in payment of appellants franchise tax for said year, and then and there demanded of appellant the sum of $205 in payment of its franchise tax for said year as required by said Act of 1897. Appellant's authorized capital stock is $2,500,000. Said Act only imposes the sum of $50 as the annual franchise tax on any domestic corporation which has the same authorized capital stock as appellant. There is a discrimination against appellant and all other foreign corporations

of the same authorized capital stock and class in said tax, of $155 per annum.

It is admitted that if the defendant forfeits or declares forfeited the permit of appellant to do business in the State of Texas, that it will occasion a multiplicity of suits, and that its interests in the State of Texas amounting to over $50,000 will be wholly jeopardized, and that all the stock in appellant corporation will be clouded and its value thereby greatly depreciated, and that appellant will thereby suffer irreparable injury.

The following are the Acts of the legislature of the State of Texas relating to this case and to be construed in the disposition thereof, to-wit:

> "An Act to require foreign corporations to file their articles of incorporation with the Secretary of State, and imposing certain conditions upon such corporations transacting business in this State, etc."

"Section 1. Be it enacted by the legislature of the State of Texas: That hereafter any corporation for pecuniary profit (except as hereinafter provided), organized or created under the laws of any other State, or of any territory of the United States, or any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this State, or solicit business in this State, or establish a general or special office in this State, shall be and the same are hereby required to file with the Secretary of State a duly certified copy of its articles of incorporation, and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this State. If such corporation is created for more than one purpose, the permit may be limited to one or more purposes.

Sec. 2. All such corporations now transacting business in this State shall have four months from the date when this Act takes effect to comply with the conditions hereof by filing their articles of incorporation as provided in section 1 of this Act.

Sec. 3 Thereafter no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort, unless at the time such contract was made or tort committed the corporation had filed its articles of incorporation under the provisions of this Act, in the office of the Secretary of State, for the purpose of procuring its permit."

Section 4 exempts railroads.

Section 5 prescribes the fees to be paid in advance by the foreign corporation for procuring such permit.

Sec. 6 No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the Secretary of State.

Approved April 3, 1889."

"An Act to fix the rate of taxation on insurance companies, telephone companies, sleeping and dining car companies, and other corporations; to prescribe the time and manner for collecting such taxes; to provide penalties of the violation of the provisions of this Act, and to repeal all laws and parts of laws in conflict therewith."

Section 1 relates to life, fire, marine, accident and other insurance companies.

Section 2 relates to telephone companies.

Section 3 relates to sleeping and dining car companies.

Section 4 relates to the foregoing corporations.

"Sec. 5. That each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this State, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this State, in this State, shall pay to the Secretary of State, annually, on or before the first day of May, a franchise tax of ten dollars. *Any such corporation which shall fail to pay the tax provided for in this section shall, because of such failure, forfeit their charter.*

Section 6. The Secretary of State shall, on or before the first day of March of each year, notify all corporations subject to the tax provided in the preceding section, and in thirty days after the first day of May of each year shall publish a list of the charters forfeited for noncompliance with this Act: Provided, that any corporation which shall, within sixty days after such publication, pay the tax and $5 additional thereto, shall be relieved from forfeiture of its charter by reason of such failure: Provided further, that this Act shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State.

Approved May 11, A. D., 1893."

"An Act to amend Articles 5243i, 5243j and 5243k of an Act entitled, 'An Act to amend Articles 5243e, 5243i, 5243j and 5243k, of chapter 9, title 104, of the Revised Civil Statutes, *relating to the taxation of insurance, telephone, sleeping and dining car and other corporations*, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this Act, and to define and prescribe the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this Act,' passed at the present session and approved April 30, 1897."

Section 1. Be it enacted by the legislature of the State of Texas: That Articles 5243i, 5243j and 5243k of an Act entitled, "An Act to amend Articles 5243e, 5243i, 5243j and 5243k of chapter 9, title 104, of the Revised Civil Statutes, *relating to the taxation of*

insurance, telephone, sleeping and dining car and other corporations, and to provide for forfeiting the charters of domestic corporations and permits of foreign corporations to do business in this State for failure to pay the franchise tax levied by this Act, and to describe and define the notice to be given to said corporations previous to such forfeiture, and to provide adequate penalties for a violation of this act," passed at the present session and approved April 30, 1897, be and the same is hereby amended so as to hereafter read as follows:

Article 5243i. Each and every private domestic corporation heretofore chartered under the laws of this State shall pay to the Secretary of State an annual franchise tax of ten dollars, on or before the first day of May of each year; and every such corporation which shall be hereafter chartered under the laws of this State shall also pay to the Secretary of State an annual franchise tax of ten dollars, the tax for the first year to be paid at the time such charter is filed, and the Secretary of State shall not be required or permitted to file such charter until such tax is paid, and each succeeding tax shall be paid on or before the first day of May of each year thereafter; provided, that any such corporation having an authorized capital stock of over fifty thousand dollars and less than an hundred thousand dollars, shall pay an annual franchise tax of twenty dollars; and every such corporation having an authorized capital stock of one hundred thousand dollars and less than two hundred thousand dollars, shall pay an annual franchise tax of thirty dollars, and every such corporation having an authorized capital stock of two hundred thousand dollars or more, shall pay an annual franchise tax of fifty dollars. *Each and every foreign corporation heretofore authorized to do business in this State, under the laws of this State, shall, on or before the first day of May of each year*, and each and every such corporation which shall hereafter be so authorized to do business in this State, shall, at the time so authorized, and on or before the first day of May of each year thereafter, *pay to the Secretary of State the following franchise tax*: Every such corporation having an authorized capital stock of twenty-five thousand dollars or less, an annual franchise tax of twenty-five dollars; every such corporation having an authorized capital stock of more than twenty-five thousand dollars and not exceeding one hundred thousand dollars, an annual franchise tax of one hundred dollars; every such corporation having an authorized capital stock of over one hundred thousand dollars, an annual franchise tax of one hundred dollars and in addition thereto an annual franchise tax of one dollar for every ten thousand dollars of authorized capital stock over and above one hundred thousand dollars, and not exceeding one million dollars; and if such authorized capital stock exceeds one million dollars, then such corporation shall pay a still further additional tax of one dollar for every one hundred thousand dollars over and above one million dollars. *Any corporation, either domestic or foreign, which shall fail to pay the tax provided for in this article at the time specified herein, shall, be-*

cause of such failure, forfeit its right to do business in this State, which forfeiture shall be consummated, without judicial ascertainment by the Secretary of State entering upon the margin of the ledger kept in his office relating to such corporations the word "forfeited," giving the date of such forfeiture; and any corporation whose right to do business may be thus forfeited, shall be denied the right to sue or defend in any of the courts of this State, and in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief may be granted to such defendant corporation, unless its right to do business is revived as provided in Article 5243j of this Act. All transportation companies now paying an annual income tax on their gross receipts in this State, shall be exempted from the franchise tax above imposed.

Article 5243j. The Secretary of State shall, on or before the first day of March of each year, notify all private domestic and foreign corporations subject to a franchise tax by any law of this State, by mailing to the postoffice named as the principal place of business of such corporation in its articles of incorporation, or to any other place of business of such corporation, addressed in its corporate name, a written or printed notice that such tax will be due at a date named therein; a record of the date of such mailing must be kept by said officer, and which mailing of said notice and the said record thereof shall constitute legal and sufficient notice for all the purposes of this Act: and in thirty days after the first day of May of each year, said officer shall publish for ten consecutive days in some daily newspaper published in this State, a list of the corporations whose right to do business in this State has been forfeited for noncompliance with this Act; provided, that any corporation which shall, within six months after such publication, pay the tax and five dollars ($5) additional thereto, for each month or fractional part of a month which shall elapse after such forfeiture; shall be relieved from the forfeiture of its right to do business by reason of such failure, and when said tax and the said penalty are fully paid to the Secretary of State, it shall be the duty of said officer to revive and reinstate said right to do business by erasing or canceling the word "Forfeited" from his ledger, and substituting therefor the word "Revived," giving the date of such revival: provided, further, that this chapter shall not be construed to repeal any law prescribing fees to be collected by the Secretary of State."

Article 5243k exempts corporations organized for the purpose of religious worship, providing burial places, holding agricultural fairs, encouraging agricultural pursuits, or for educational or charitable purposes. This article also classifies and imposes a tax on sleeping, dining car and palace car companies doing business in this State.

"Section 2. *The fact that the close of this session is rapidly approaching, and the further fact that the State is greatly in need of revenue*, and in order to remove any doubt of the proper construction

of the articles hereby amended, *creates an emergency, and an imperative public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect from and after its passage, and it is so enacted.*

Approved May 15, 1897."

The Constitution of Texas material to the disposition of the issues in this cause.

"ARTICLE VIII.

TAXATION AND REVENUE.

"Section 1. *Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations,* other than municipal, *doing any business in this State. It may also tax incomes of both natural persons and corporations,* other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; provided, that $250 worth of household and kitchen furniture, belonging to each family in this State, shall be exempt from taxation, and provided further, that the occupation tax levied by any county, city or town, for any year, on persons or corporations pursuing any profession or business, shall not exceed one-half of the tax levied by the State for the same period on such profession or business.

"Sec. 2. *All occupation taxes shall be equal and uniform upon the same class of subjects, within the limits of the authority levying the tax.*"

The other sections of said Article VIII relate to the assessment, collection of taxes and tax sales, and are not material to the case in question.

APPEAL.

An appeal was allowed by the U. S. Circuit court from said decree (Record, p. 14) to the Supreme court of the United States, and a supersedeas bond was duly filed; and appellant respectfully asks a reversal of said decree upon the following assignments of error:

I.

FOURTH ASSIGNMENT OF ERROR.

The court further erred in its decree sustaining defendant's first and third demurrers to plaintiff's bill and in holding that the Act in question was valid, and in refusing to enjoin the defendant from collecting the tax imposed by said Act of the plaintiff, and from forfeiting plaintiff's permit or contract to carry on its business in Texas, as plaintiff would suffer irreparable injury thereby, because said Act

in question is repugnant to Article VIII, sections 1 and 2, of the Constitution of Texas, requiring all taxes, of whatsoever nature, to be equal and uniform on all persons, whether natural or artificial (R. 15).

FIRST PROPOSITION.

"The Circuit court of the United States will restrain a State officer from executing an unconstitutional statute of the State, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution, and would do irreparable damage and injury to him" (Ex parte Tyler, 149 U. S. 698, L. Ed.).

Smyth et al vs. Ames et al Opinion by U. S. Supreme court, rendered March 7, 1898.
Ex parte Ayers, 123 U. S. 228 (L. Ed.)
Dodge vs. Woolsey, 59 U. S. 402 (L. Ed.)
U. S. vs. Lee, 106 U. S. 171 (L. Ed.)
Cummings vs. National Bank, 101 U. S. 903 (L. Ed.)
Osborne vs. Bank, 9 Wheat. 859 (L. Ed.)
Davis vs. Gray, 93 U. S. 453 (L. Ed.)
Allen vs. B. & O. Ry. Co., 114 U. S. 200 (L. Ed.)
Board of Liquidation vs. McComb, 92 U. S. 624 (L. Ed.)
Woodruff vs. Trapnell, 10 Howard 190 (L. Ed.)
Davis vs. Burnett, 77 Tex., 3.
Court vs. O'Connor, 63 Tex., 338.

The same court, in another leading case, lays down the law as follows:

"It has been well settled that when a plain, official duty, requiring no exercise of discretion, is to be performed and performance is refused, and any person who will sustain a personal injury by said refusal, may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the rights of mandamus and injunction are somewhat correlative to each other in either case. If the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issue of the writ. An unconstitutional law will be treated by the courts as null and void" (Seipert vs. Lewis, 122 U. S. 284).

"It has been repeatedly and uniformly held by this court (U. S. Supreme court) that an injunction will lie to restrain the collection of taxes sought to be collected uy seizures of property imposed in the name of the State, but contrary to the Constitution of the United States, the defendants being officers of the State threatening the distraint complained of. The vital principle in all such cases is that the defendants, though professing to act as officers of the State, are threatening the violation of the personal

property rights of the complainant, for which they are personally or individually liable" (Ex parte Ayers, 123 U. S. 228).

SECOND PROPOSITION.

The legislature of a State cannot arbitrarily classify persons or corporations for the purpose of discriminating against such, in the imposition of taxes.

Constitution of Texas, Art. VIII, sections 1 and 2, page 11 this brief.
G. C. & S. F. vs. Ellis, 165 U. S. 666 (L. Ed.)
Bell Gap R. Co. vs. Penn, 134 U. S. 892 (L. Ed.)
State vs. Loomis, 114 Mo. 307.
Van Zant vs. Waddell, 2 Yerg. 260.
Stratton vs. Morris, 89 Tenn., 497.

Justice Brewer voicing the opinion of the Supreme court of the United States in the case of

G. C. & S. F. vs. Ellis, 165 U. S. 666,

in discussing the right of a State to classify persons, natural or artificial, in order to impose any burdens on such, says:

"A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens, and it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of the attorney's fees of the parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall alone be thus subjected, or all men possessed of a certain wealth. These are discriminations which do not furnish any proper basis for the attempted classification. They must always rest upon some difference which bears a reasonable and just relation to the act in every respect to which the classification is proposed, and can never be made arbitrarily and without such basis."

The same court, in the case of

Bells Gap Ry. Co. vs. Penn, 134 U. S.,

relative to classification for the purpose of taxation, says:

"All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their constitution; but clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the Constitutional prohibition."

The discrimination between domestic and foreign corporations in the rate of taxation, is made because of the ownership of the franchises or property, and not from any specific differences in the character of the property, or in the specific uses to which it is applied.

It is not classifying property or corporations for taxation upon any equitable basis, or according to the established rules of law. If the classification of all corporations into domestic and foreign for the purposes of discrimination, as attempted by the act in question, can be done, then there is absolutely no protection against unequal and oppressive taxation of foreign corporations by the State, under Art. VIII of its constitution, after this State has induced them to come within its jurisdiction. Taxation in such event can be made confiscatory, and the State could, after it has obtained jurisdiction of the foreign corporation and its property, impose any occupation or ad valorem tax on the corporation or its property, and before it could extricate itself from the power of the State, all its property and effects could be confiscated by the taxation. *Can Texas, under the inhibition in her constitution, after it has a foreign corporation and its property within its jurisdiction, in fact and of right impose an ad valorem tax on all the property and effects of such corporation ten or one hundred times as great as on that of all other persons in the State, and thereby confiscate the property of the foreign corporation? And if it does not submit to such arbitrary law and pay such tax, as a penalty forfeit its permit? This is an analogous case to the one in question.* If the State of Texas can impose a tax on appellant's property or franchise four times as great as that imposed on domestic corporations of the same class, it can raise said tax to 1000 times the present amount, and we would have a system established with a power of oppression under which few men should ever be contented to live.

Who in reality owns the property and effects of appellant? Is it the corporation, an intangible and invisible something? We must respectfully answer in the negative. It is the citizens of Arkansas and Texas who own all of said property and effects and indirectly pay all the taxes. Who is then injured, and whose property is confiscated by the oppressive law. It is that of the citizen who owns the stock of the corporation.

THIRD PROPOSITION.

Said act approved May 15, 1897, which imposes a heavier franchise tax on foreign corporations than on domestic corporations of the same class grossly discriminates in favor of domestic corporations and against foreign corporations and is therefore repugnant to and in violation of Sections 1 and 2 of Article VIII of the Constitution of Texas, which prescribes that all taxes of whatsoever nature shall be equal and uniform on all persons whether natural or artificial, and therefore said act is null and void.

Art. VIII. Sections 1 and 2, Constitution of Texas, page 11 of this brief.
G. C. & S. F. vs. Ellis, 165 U. S., 666.
Cummings vs. Merchants National Bank, 101 U. S. 905.
Parker vs. N. British Ins. Co., 42 La. Annual, 428.
S. C., 7 So: Rep. 599.
Exchange Bank vs. Hines, 3 Ohio St., 1.
Erie R. R. Co. vs. State, 31 N. J. L., 543.
Railroad Tax Cases, 13 Fed. Rep., 722.
Santa Clara Co. vs. So. P. R. R. Co., 18 Fed. Rep., 385.
Detroit vs. H. P. Co., 43 Mich., 146.
Springvalley Waterworks vs. Schottler, 62 Cal., 72.
Oliver vs. Washington Mills, 93 Mass., 279.
Ottawa Glass Co. vs. McCaleb, 81 Ill., 556.
State vs. Cumb. R. R. Co., 40 Md., 50.
Worth vs. R. R. Co. 89 N. C., 301.
Bartlett vs. Carter, 59 N. H., 105.
Mobile vs. Stonewall Ins. Co., 53 Ala., 570.

A comparison of the Acts of 1889 and 1893 and the Act approved May 15, 1897, showing that the latter Act imposes a tax and not a license or license tax.

Appellant accepted the invitation extended to corporations generally by the Act of the Legislature of Texas approved April 3, 1889, (see Act herein page 11) and on the 24th day of July, 1896, filed a copy of its articles of association with the Secretary of State and paid the State $200 in cash in accordance with said Act, and procured from the State through its Secretary of State its permit or contract in writing which states, "And I (the Secretary of State) hereby declare that said corporation having fully complied with the law, is entitled to and is hereby granted the permission to carry on its business 'the accumulation and loan of money' in this State in accordance with the provisions of said Act of April 3, 1889, for the term of ten years from the date hereof, in accordance with the purposes herein specified." (Record page 7).

It then and thereby came within the jurisdiction of Texas in fact and of right. There was only one other law found upon the statute books of Texas affecting appellant as a corporation at said time and that was the Act of May 11, 1893, (see Act herein page 11) imposing a uniform license tax of $10 upon all corporations alike, both domestic and foreign. The penalty for failure to pay said license as prescribed by said Act was, "Any such corporation which shall fail to pay the tax provided for in this section shall, because of such failure, *forfeit their charter.*"

Neither the Legislature nor the judiciary of Texas has any right whatever to "forfeit the charter" of a foreign corporation. That is a right vested alone in the State or nation which created the corporation and of which it is a

citizen. This principle of law is too well established to admit of argument.

Society for Propagation of Gospel vs. New Haven, 8 Wheat. (U. S.) 464.
Folger vs. Columbian Ice Co., 99 Mass. 267.
Merrick vs. Van Santvoord, 34 N. Y. 208.
Importing & C. Co. vs. Locke, 50 Ala. 335.
Hart vs. Boston & C. Ry. Co., 40 Conn. 539.

If the foreign corporation did not pay the license tax, the State could of course sue it and compel it to pay the tax in that manner, but we respectfully submit there was no method prescribed by said Act or any law of Texas for revoking or forfeiting the permit of the foreign corporation for failure to pay this tax, and hence the State could not do so until it prescribed a proper remedy therefor.

Perhaps without any specific statute the State could, by the writ of ouster, drive the foreign corporation from its borders for ultra vires acts, or other wrongs, but it could not forfeit the charter.

The Act of April 3, 1889, and the act of May 11, 1893, became a part and parcel of appellant's contract to do business in this State for the period of ten years from the 24th day of July, 1896 Appellant paid a valuable consideration therefor to the State and entered into the same in good faith, and it had a right to rely upon the good faith of the State, and to expect just treatment from the State. Said permit or contract is more than a mere license to carry on a business which is *malum in se*, such as selling spiritous liquors or gambling. It is a license or power coupled with an interest. Relying upon the good faith of Texas to perform her part of the contract, the appellant came within its jurisdiction, and prior to May 15, 1897, invested over $50,000 in this State and became thereby the owner of large interests in this State.

The permit or contract of appellant is of the same character of contract as that of a charter granted to a corporation by the State. The State, by its reserve power, has the right by prescribing the proper remedy to control or revoke the franchises granted by the permit or charter, whenever it deems such to be necessary for the welfare of society. But until the State does in fact revoke the charter or permit in the proper manner and by due process of law the charter or permit remains the contract between the State and the corporation, as to all its property rights and as to taxation. This corporation is entitled, under said contract, to all the constitutional guaranties of the State and of the Supreme law of the land.

The Act then of May 15, 1897, is a violation of appellant's contract with the State. It arbitrarily classifies all corporations into two great classes, to-wit: domestic and foreign, for the purposes of taxation, and such a classification is without precedent, and is against all the established rules.

The Act then discriminates against one of the classes and in favor of the other in the imposition of the tax, which is prohibited by the State constitution.

The Act of May 15, 1897, has but one object, to-wit: that of imposing and collecting taxes for the support of the government, and the word license or license tax is not mentioned therein.

Notice carefully the title of the Act: "An Act to amend Articles etc., etc., of the Revised Civil Statutes *relating to taxation* of insurance, telephone, sleeping and dining car and *other corporations.*" The enacting clause declares the object of the Act is "taxation of insurance, telephone, sleeping and dining car and *other corporations.*"

The second section of said Act states: "*Each and every foreign corporation heretofore authorized to do business in this State under the laws of this State, shall, on or before the first day of May of each year, etc., pay to the Secretary of State the following franchise tax.*" The *burdens imposed by the Act* is designated by the legislature as *a tax* in every section of the Act—and in order that there may be no possibility of mistaking the intent of the legislature, please read the emergency clause of the Act:

"*The fact that the close of this session is rapidly approaching, and the further fact that the State is greatly in need of revenue ..... creates an emergency and an important public necessity exists* that the constitutional rule requiring bills to be read on three several days be suspended *and that this Act takes effect from and after its passage, and it is so enacted.*"

The legislature has *branded this discriminating burden* on foreign corporations "*a tax*" to *raise revenue for* the *support of the government. This Act does not refer, either directly or indirectly to the Act of April 3, 1889. It neither amends, supplements or repeals any part of said Act of 1889, which prescribes all the conditions on which a foreign corporation may come within the jurisdiction of Texas and carry on its business. Said last named Act stands altogether separate and independent of the Act in question. It alone prescribes the license fee to be paid for the permit and all other requisites and conditions precedent to be complied with by the foreign corporation in order to enter the State of Texas.*

Does the Act in question make the payment of the tax therein a condition precedent to the foreign corporation already in the State in fact and of right at the time of the passage of the Act, reentering therein? The answer must be in the negative. *The Act took effect and became a law on the 15th day of May, 1897, and it provides that "Each and every foreign corporation heretofore authorized to do business in this State under the laws of this State, shall, on or before the first day of May of each year .... pay to the Secretary the following franchise tax."*

Foreign corporations which were in the State at the time of the passage of said Act of May 15, 1897, and "authorized to do busi-

ness in this State under the laws of this State" (the Act of April 3, 1889,) *should begin paying the tax on the 1st day of May, 1898, or at the end of the first year after the law took effect.* Then the tax as to appellant is payable at the end of the year and not in advance. The ordinary penalty for failure to pay taxes is usually double the tax and all additional costs incurred and the same can be enforced by suit.

What is the penalty for failure to pay the tax imposed by the Act in question? It is a summary forfeiture of the permit of the foreign corporation and the forfeiture of the charter of the domestic corporation. *This penalty prescribed is simply to enforce the collection of the tax at the end of the year instead of the ordinary remedy by suit.*

We submit that the payment of this tax is not a condition precedent to the foreign corporation already within the State carrying on its business here. The Act in question then does not impose any license or license tax as a condition of such foreign corporation entering the State, but it simply imposes an unjust tax on the foreign corporation already in the jurisdiction of the State.

In construing a provision of the Constitution of Ohio which is similar to that of the State of Texas the Supreme Court of the United States quotes approvingly the opinion of the Supreme Court of Ohio in the following language to-wit:

"Taxing by uniform rule requires uniformity not only in the rate of taxation but also uniformity in the mode of the assessment upon a taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation. But this is not all; the uniformity must be co-extensive with the territory to which it applies. If a state tax it must be uniform over all the state; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to all property subject to taxation so that all property must be taxed alike, equally, which is taxing by a uniform rule." (Cummings vs. Merchants National Bank, 101 U. S., 905.)

The court further states in said opinion, page 907:

"*But, whatever may be its cause when it is recognized as a source of manifest injustice to a large class of property around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden the rule must be held void, and the injustice produced under it must be remedied so far as a judicial power can give remedy.*"

In construing the Constitution and Statutes of California which undertook to discriminate against railroad corporations as a class in the imposition of taxes the U. S. Circuit Court in an opinion delivered by Justices Fields and Sawyer states:

"The 14th Amendment to the Constitution in declaring that no State shall deny any person within its jurisdiction the equal protection of the laws imposes a limitation upon the exercise of all the powers of the State which cannot touch the individual or his property, including among them that of taxation. Whatever the State may do it cannot deprive any one within its jurisdiction of the equal protection of the laws." (The Railroad tax cases, 13 Fed. Rep., 733.)

Said Court in the same opinion further states:

"What is called for under a constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment. The forced contribution from one which would follow taxation of his property without reference to a common ratio would be inconsistent with that equal protection which the amendment requires the State to extend to every person within its jurisdiction." (id. 734.)

The Supreme court of Louisiana, under the State Constitution of that State which is very similar to the Constitution of Texas in construing a statute in regard to taxation which imposed a heavier tax on foreign insurance companies than on domestic corporations of the State says:

"The tax is resisted on the ground that it is without warrant under the Constitution and laws of the State. *The Constitution contemplates only two kinds of taxes, to-wit: property taxes and license taxes. We are not prepared or required to say whether such a tax, if inposed, in proper terms as a license tax, would be valid. It is not, and does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the Act.* The very proceeding taken by the State is one provided exclusively for the collection of the property taxes: and under the terms of the pleadings, as well as under the assessment itself, it is claimed and denominated as a tax on property.

Then the question simply stated is, whether a property tax levied on the gross receipts of a limited and particular class of persons, and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that "all property shall be taxed in proportion to its value" would seem peremptorily to settle this question. If gross receipts be property subject to taxation, the gross receipts of all or of none must be taxed." (Parker vs. N. British Ins. Co., 42 L. Am., 428.)

The same court in the same opinion also used the following language which is very appropriate to the present case:

"As we have heretofore intimated, *if this act merely imposed on the foreign insurance company the duty of paying to the State a certain percentage of its premiums received as a condition of a permissive license to transact business in this State, different questions would be presented. That would not be a tax, and would not involve the exercise of the taxing power. But the imposition here is levied as a tax, assessed as a tax, claimed as a tax* by the tax collector, under proceedings provided exclusively for the collection of taxes. *It is a distinct*

exercise of the taxing power, and must be governed by all constitutional requirements and limitations applicable thereto" (Id. 600-601).

The Supreme court of the State of New Jersey in a well considered case in construing a statute of that State which undertook to discriminate in the taxation against foreign corporations, used the following terse language:

"Laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions, as a prerequisite to their admission in an incorporated capacity, into the State. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the State in which they are enacted from loss or imposition, and on this ground their legality cannot be drawn in question. *But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or company on whom the tax falls, as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgement of the legal status of the person or company whose property is taken.* To assert that the company whose property is thus taken has no rights but such as the government taking it chooses to confer, is to assert that such company has no title to its property but such as may be conceded to it by the taxing power. *It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence for the purpose of depriving it of those rights which belong to every individual or company known to the law.* Such a doctrine would, obviously, offer the entire property of foreign corporations as a prize to the rapacity of any State in whose territories it might be, or over which it might happen to be carried" (Erie Ry. Co. vs. State, Vol. 31, 543 N. J. Law).

DISTINCTION BETWEEN A TAX AND A LICENSE.

A license is always prescribed and issued by the State under and by virtue of its police power. Mr. Cooley says in his admirable work on "Constitutional Limitations," (5th Ed. p. 712): "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety or welfare of society." Again, on page 725, said author further states: *License laws are of two kinds; those which regulate the payment of the license fee by way of raising a revenue, and are, therefore, the exercise of the power of taxation, and those which are mere police regulations, and require the payment only of such license fee as will cover the expense of the license, and of enforcing the regulation.*" Again, on page 244, the same author says: "*A license is issued under the police power, and the exaction of the license fee with a view to revenue would be an exercise of the power of taxation.*"

FOURTH PROPOSITION.

"There is a clear distinction recognized between a license granted or required as a condition precedent before a certain thing can be done, and a tax assessed on the business which that license may authorize one to engage in. A license is a right granted by some competent authority to do an act which, without such authority, would be illegal. A tax is a rate or sum of money assessed upon the person or property, etc., of the citizen." (Cooley on Taxation, 386.)

San Francisco vs. Liverpool L. & G. Co., 74 Cal. 113.
Home Insurance Co. vs. Augusta, 50 Ga. 537.
Parker vs. N. British Ins. Co., 42 La. A. 428.
S. C. 7 So. Rep. 599.
Van Hook vs. Selma 70 Ala. 361.
Erie R. R. Co. vs. State, 31 N. J. Law 543.
Savannah vs. Charleston, 36 Ga. 462.
Railway Tax Cases, 13 Fed. Rep. 775.
Morgan vs. Orange, 50 N. J. Law 389.
Cooley on Constitutional Limitations, 6th Ed., p. 707.

The Supreme court of California, in a leading case, under facts in every particular similar to those in this case, says:

"*We come now to the inquiry. is the exaction here in question a tax? The statute itself denominates it a tax, and it must be confessed that it has all the characteristics of a tax. It is a charge imposed by the Legislature for the purpose of revenue.* It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution, levied by the authority of the State, and, as respondent claims for public needs. *That it has all the attributes to a tax is practically admitted by the respondent, but it is sought by a very subtile process of reasoning to show that, in this particular case, it must not be regarded as a tax.*

However deftly it is stated, the point in all this specious logic is that, unless it be held something else than a tax, it may be unconstitutional. Laws are not to be declared unconstitutional unless clearly so, and, if two constructions are possible, and according to one the law must be held unconstitutional, and under the other construction it can be sustained, that construction must be adopted which will sustain the law. This principle is not disputed, and it is often of great value, but it must not be pressed so far as to amount to an abdication of its functions on the part of the court, nor a denial of justice to suitors. If we can clearly see that a law is beyond the power of the legislature, we must so declare. *It is claimed that this is a sum paid by the corporation for the privilege of acting as such in the State, and therefore not a tax. The plausibility of the claim consists in apparently identifying this case with cases in which it is clear the exaction is a condition, and from which this is made to differ only in degree. If the condition had been that*

the corporation should pay a fixed sum for the privilege before it was allowed to do business at all, it would no doubt, be held a condition, and not a tax; so, perhaps, if the license were required to be renewed at stated periods, and it has been held that, when the corporation is required to pay a percentage upon its receipts, and the payment is required to be secured by a bond before the corporation is allowed to do business in the State, this special requirement distinguishes it from ordinary taxation, and stamps its character. Trustees, etc. vs. Roome, 93 N. Y., 325. So the two classes, one of which is plainly taxation, and the other a sum paid for a permit, may be approximated until it is difficult or impossible to say to which class a given case may belong. These difficulties to discriminate the principles underlying different cases constantly included in different classes, and to which the same rule of decision cannot be applied, constitute the perpetual debating grounds of the law and occasion much of the confusion in the decisions. But, as was remarked by Judge Marshall, because we cannot easily draw the line does not prove that there is no difference in principle. No one fails to note the contrast between the light of day and the darkness of night, but no one is able to draw the line between daylight and darkness, or note the precise instant when one ends and the other begins. I have said *the act on its face denominates the exaction a tax*, and that it is imposed according to the methods of taxation. It is also manifest from the act *that the chief reason of the tax is to raise money*. No one can read the law without being so impressed ....

We find, in the next place, that when the statute was passed, the conditions upon which foreign corporations could do business were prescribed, and very full provision had been made on the subject. Sections 622-624 Pol. Code. See, also, St. 1871-72, 826. *In the Act in question these statutes are not alluded to, and they have never been amended or repealed. There is nothing in the law we are considering to indicate that it was intended as a condition,* except when viewed in the light of the rule requiring us to so construe it, rather than to declare it void. Now, a business may be licensed, and still be subject to be taxed. A license proper is a permit to do business which could not be done without the license. It is a mere permit. It may be thus licensed, and then subject to a license tax. These licenses may not differ in form, but one is a license proper, and the other is a license tax, imposed for the purpose of revenue."

A license, so all the authorities hold, is imposed under the police power of the State, whereas all taxes are imposed under the taxing power of the State. The two different powers of the State must always be borne in mind, and the distinction must always be drawn between them. Large latitude is given to the State always in regulations of any kind imposed on a person under the police power of the State, whereas the power of taxation is construed much more strictly, and the legislature of a State, in enacting laws for the purpose of taxation, must keep strictly within the constitutional limitations and inhibitions on the power of tax-

ation, both of the State and of the national constitution. The ablest writer on Constitutional Limitations says:

"All that the Federal authority can do is to see that the States do not, under cover of this power (police power), invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, deprive any citizen of rights guaranteed by the Federal constitution" (Cooley on Constitutional Limitations, 6th Ed. 707).

The same author also states: "The regulations (under police power) must have reference to the comfort, safety and welfare of society: they must not be in conflict with any of the provisions of the charter; and they must not under pretense of regulations take from the corporation any of the essential rights and privileges which the charter confers" (Id. 710).

The Supreme court of New Jersey has correctly declared that: "*A higher license imposed on a nonresident than on a resident for the purpose of revenue, is void.*" (Morgan vs. Orange, 50 N. J. Law, 389).

Of the power of taxation Mr. Cooley says: "*In the second place it is of the very essence af taxation that it be levied with equality and uniformity,* and, to this end, there should be some system of apportionment. Where the burden is equal, there should be equal contribution to discharge it.....The rule of uniformity must be applied to all subjects of taxation within the district and class." (Cooley on Constitutional Limitations, 607).

FIFTH PROPOSITION.

The franchises of a corporation are personal property, and the tax imposed by the Act in question on the franchises of foreign corporations, as well as domestic corporations, is a property tax.

Horn Silver Mining Co. vs. N. Y., 143 U. S. 167.
Society for Savings vs. Coite, 73 U. S. 897 (L. Ed.)
S. C. 6 Wall.
Beeville Nail Co. vs. People, 98 Ill. 399.
Atlantic etc. R. R. Co. vs. Mechlenburg Co , 87 N. C. 129.
Baltimore vs. B. etc. R. R. Co., 6 Gill. (Md.) 288.
Fall vs. Marysville, 19 Cal. 391.
Central P. R. R. Co. vs. Board of Equalization, 60 Cal. 35.
State Board of Assessors vs. State, 48 N. J. Law 146.
Com. vs. Provident, Inst. 12 Allen (Mass.) 312.

In the first case cited under the above proposition the Supreme court of the United States says. (page 167, 143 U. S., L. Ed.)

"The right and privilege, or the franchise as it may be termed, of being a corporation, is of great value to its members and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most States, this franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation."

Such taxation, the court further states in the same opinion: "*is controlled by the organic law of the State.*"

The same court also holds in the case of

Society for Savings vs. Coite, 73 U. S., that:

"Corporate franchises are legal estates vested in the corporation as soon as it is in esse. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchises."

Having, as we think, conclusively shown that the legislature by said Act intended to impose a tax on corporations that were at that time within the jurisdiction of Texas, in fact and of right, then we assert that such tax on the franchises of the corporations is a tax on the property of the corporation. The franchises of every corporation are the property of such corporation, and are a part of the assets of such corporation. Said franchises are susceptible of being sold or mortgaged, and hence a tax on the franchise of a corporation is a property tax, and must necessarily be uniform and equal on all corporations, whether domestic or foreign, as prescribed by Section 1 of Article VIII, of our constitution.

The Supreme court of Texas defines "equal and uniform taxes" thus: "Taxes are said, within the meaning of the constitution, to be equal and uniform when no person nor class of persons within the taxing district, whether a State, county, or other municipal corporation, is taxed at a different rate than are other persons in the same district, upon the same value or upon the same thing, and where the objects of taxation are the same by whomsoever owned or whatever they be"

Norris vs. City of Waco, 57 Tex., 641.

Mr. Thompson, in the 6th volume of his able work on Corporations, says that a franchise tax on corporations like that in question is a tax levied on the business of the corporation, or for the privilege of exercising its business, or calling, or occupation, and hence, in the judgment of Mr. Thompson, the tax is an occupation tax and not a property tax. There are some authorities sustaining this doctrine.

SIXTH PROPOSITION.

If it be construed that the tax in question is an occupation tax, then we invoke Section 2 of Article VIII of the Constitution of Texas, which prescribes that "all occupation taxes shall be equal and uniform," and hence the Act in question is repugnant to said clause of the State Constitution, and therefore null and void.

Hoefling vs. San Antonio, 20 S. W. 86 (By Supreme court of Texas.)

CONSTRUCTION OF ARTICLE EIGHT, OF THE CONSTITUTION OF TEXAS.

"Sec. 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal corporations, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. The legislature may impose a poll tax. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and corporations, other than municipal.

Sec. 2. All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

There are only four classes of taxes contemplated by said article of the constitution, viz., property taxes, poll taxes, occupation taxes and income taxes. We respectfully submit that the legislature of the State of Texas is only authorized to impose the four classes of taxes designated by Article VIII. Can it be said that the tax in question is a poll tax? We think not. Can it be contended with any degree of reason that the tax in question is an income tax? We think this question also must be answered in the negative. *Then, unquestionably, the tax in question must either be an occupation tax or a property tax; but if, perchance, by any stretch of the imagination it should be construed as any other class of tax than that designated in the 1st section of Article VIII*, of the Constitution of Texas, then we invoke the first sentence of section 1:

SEVENTH PROPOSITION.

"Taxation shall be equal and uniform" on all persons, regardless of the kind or class of tax imposed.

Parker vs. N. British & M. Co., 42 La. Ann, 428.
S. C. 7 So. Rep. 599.

Can any language upon the subject of taxation be broader than the first sentence of section 1, Article VIII? *"Taxation shall be equal and uniform."* If the language means anything it means *all taxes* shall be equal and uniform on *all persons, under any and all circumstances.* The constitutional inhibition prohibits the legislature from discriminating against any person or class of persons in the imposition of taxes. The Supreme court of Louisiana, in the last case above cited, in passing upon a statute enacted by the legislature of that State discriminating against foreign corporations, says:

"The constitution contemplates only two kinds of taxes, property tax and license tax. We are not prepared or required to say whether such tax imposed in proper terms as a license tax would be valid. It is not, and does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the Act ..... The State in this matter is un-

doubtedly exercising the power of taxation. *This power is derived from and regulated by the Constitution of the State. No matter who may be the subject or what may be the object of the tax, the State in exercising this power is bound to conform to the requirements of the constitution. That instrument makes no discrimination of persons, and a tax which would be unconstitutional if levied upon property belonging to citizens of the State, is clearly unconstitutional as against foreigners, whether individuals or corporations.* The decisions of the Supreme court of the United States holding that the States may impose such terms as they see fit as the conditions of their consenting to permit foreign corporations, or corporations organized in other States, to enter and do business in a different State, without thereby violating the constitution of the United States, have no application to this question.

Paul vs. Virginia, 8 Wall 168.
Ducat vs. Chicago, 10 Wall 410.
Doyle vs. Insurance Co., 94 U. S.

These decisions only held that State laws of this character, though making discriminations against foreign corporations, did not conflict with those provisions of the Federal constitution with reference to the privileges and immunities of citizens of different States and the regulation of commerce."

In none of said cases did the corporation invoke any inhibition of the Constitution of the State. Neither did the corporation invoke the 14th amendment to the National constitution. The effect of all of said cases is that a State could prescribe any license or license tax as a condition precedent to a foreign corporation coming into the State. The question of taxation is not raised in any of said three cases. The only issue involved is the imposition of a license under the police power of the State as a condition precedent to the corporation entering the State.

EIGHTH PROPOSITION.

"Property lying beyond the jurisdiction of the State is not a subject on which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition." —

(Cleveland Ry. Co. vs. Penn, 82 U. S. 186, L. Ed.).
The Railway Co. vs. Jackson, 74 U. S. 88 (L. Ed.)
People vs. Campbell, 34 N. E. (N. Y.) 753.

Appellee will doubtless argue that inasmuch as most of the property of appellant is situated in the State of Arkansas, therefore Texas should charge a greater tax on the franchise of appellant than she does upon the franchise of domestic corporations of the same class. This contention, however, is not supported either by reason or authority. The greater portion of the franchises of appellant are situated in the State of Arkansas, and yet Texas undertakes to levy a tax upon the whole of them, by the Act in question, which prescribes that appellant shall pay a tax four times as

great as that on domestic corporations of the same class. The unjust discrimination against appellant is too apparent to argue this point further.

II.

FIRST ASSIGNMENT OF ERROR.

"The court erred in sustaining the defendant's first and third demurrers to plaintiff's bill because the same shows that the Act of the legislature of Texas in question imposes a heavier tax on plaintiff, a foreign corporation which was within the jurisdiction of Texas, in fact and of right, under and by virtue of a written permit and contract executed to it by the State of Texas prior to said Act, than on domestic corporations of the same class, and that said Act discriminates against plaintiff and other foreign corporations, and is a species of class legislation, and obnoxious and repugnant to section 1st of the 14th amendment to the Constitution of the United States, which prescribes that no State shall "deny to any person within its jurisdiction the equal protection of the law", and therefore said Act is null and void, and the defendant should be enjoined from the collection of said illegal tax of plaintiff, and from forfeiting plaintiff's said permit to carry on its business in Texas by reason of its failure to pay said illegal tax, as plaintiff would thereby suffer irreparable injury" (R. 15).

FIRST PROPOSITION.

1. The Act of the legislature in question imposing a greater tax on foreign corporations, which are within the jurisdiction of Texas by virtue of permits from the said State, than on domestic corporations of the same class, is also repugnant to 1st section of the 14th amendment to the Constitution of the United States, which prescribes: "No State shall deny to any person within its jurisdiction the equal protection of the law" and therefore the same is void.

SECOND PROPOSITION.

There is no principle of law so well settled by the Supreme court of the United States as that "Corporations are persons within the provisions of the 14th amendment to the Constitution of the United States, and that a State has no more right to deny to corporations the equal protection of the law than it has to individual citizens" (G. C. & S. F. Ry. Co. vs. Ellis, 165 U. S.)

Smyth et al vs. Ames et al (Supreme court U. S., March 7, 1898.

G. C. & S. F. Ry. vs. Ellis, 165 U. S. 668 (L. Ed.)

Covington L. T. R. Co. vs. Samford, 164 U. S. 560 (L. Ed.)

Charlotte C. & A. R. R. Co. vs. Gibbs, 142 U. S. 1051 (L. Ed.)

Minneapolis & St. R. Co. vs. Beckwith, 129 U. S. 585, (L. Ed.)
Mo. P. R. R. Co. vs. Mackay, 127 U. S. 107 (L. Ed.)
Pembina C. S. M. & M. Co. vs. Penn, 125 U. S. 650 (L. Ed.)
Santa Clara Co. vs. S. P. R. R. Co., 118 U. S. 118.

THIRD PROPOSITION.

No State can lawfully impose heavier taxes upon the property within its limits, belonging to persons of other states, than are laid upon the property of its own citizens.

Railroad Tax Cases, 13 Fed. Rep. 722.
San Francisco vs. Liverpool L. G Co., 74 Cal. 113.
Parker vs. N. British Ins. Co., 42 La. Ann. 428.
Erie R. R. Co. vs. State, 35 N. J. Law, 543.
Brown vs. Maryland, 12 Wheat. 445.
Woodruff vs. Parhan, 8 Wall. 123.
Henson vs. Lott, 8 Wall 148.
G. C. & S. F. vs. Ellis, 165 U. S. 666.
Bowman vs. Lewis, 101 U. S., 990 (L. Ed.)
Kentucky Railroad Tax Cases, 115 U. S., 414 (L. Ed.)
Home Ins. Co. vs. New York, 134 U. S., 1028 (L. Ed.)

In Bowman vs. Lewis, 101 U. S, the court interpreting the "objects and purposes of the 14th amendment," says: "These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the State from abridging their privileges or immunities, and from depriving any person of life, liberty or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws..... It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place, and under like circumstances."

The same court, in the Kentucky Railway Tax Cases, 115 U. S., says: "But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for the purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class so that the law shall operate clearly and uniformly upon all persons in similar circumstances."

So, irrespective of the Constitution of Texas, the Act of the legislature of Texas in question is clearly repugnant to the 14th amendment to the Constitution of the United States. Corporations in said Act are divided into two great classes for the purpose of taxation, to-wit: domestic corporations and foreign corporations. Said classification is arbitrary, and is not warranted by law irrespective of our own constitution as hereinafter shown, the tax on foreign corporations being much heavier than on domestic

corporations. The Supreme court of the United States, in ascertaining whether or not the tax law is repugnant to the 14th amendment or is uniform and equal, always considers the constitution and laws of the State where the tax is imposed, so in the last case the Supreme court holds that if the Constitution of Kentucky "had required taxes to be levied by a uniform method," as the Constitution of the State of Texas provides, then unquestionably the tax imposed upon railways as a class in the State of Kentucky would be null and void and repugnant to the 14th amendment. Where a State constitution prescribes for equal and uniform taxation, as our constitution does—on all persons, both natural and artificial, there cannot be even classification of persons natural and artificial, for the purposes of discrimination in taxation, as the legislature of Texas attempted to do in said Act. Foreign corporations in this State under said Act have not the "equal protection of the laws," or of our own constitution, because "the Supreme law requires equality of burden and forbids discrimination in State taxation" (Ward vs. Maryland, 12 Wall.).

In the case of Insurance Co. vs. French, 18 Howard 404, the Supreme court of the United States, even in discussing the conditions which a State may prescribe for a foreign corporation entering the jurisdiction of such State, says: "These conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

FOURTH PROPOSITION.

The State of Texas cannot, under its own constitution, or the Constitution of the United States, impose a greater tax on foreign corporations, which are legally within the jurisdiction of the State of Texas by virtue of a contract or license from the State, than upon domestic corporations of the same class.

Baron vs. Burnside, 121 U. S., 915 (L. Ed.)
Pembina C. S. M. & M. Co. vs. Penn, 125 U. S., 652 (L. Ed.)
San Francisco vs. Liverpool L. G. Co., 74 Cal. 113.
Ward vs. Maryland, 13 Wall., 418.
S. C. 79 U. S., 449.
Gulf C. & S. F. vs. Ellis, 165 U. S , 666 (L. Ed.)
Santa Clara Tax Case, 9 Sawyer, p. 195.
Texas Land Mort. Co. vs. Worsham, 76 Tex.
S. C. 13 S. W. 384.
Oliver vs. Washington Mills, 93 Mass. 279.

The denial of the equal protection of the laws may, and most often occurs, in the enforcement of the laws of the States imposing

taxes on individuals and corporations. An individual is denied the equal protection of the laws, if his property is subjected by the State to a higher tax than is imposed upon like property of other individuals; and a foreign corporation is likewise denied the equal protection of the law which is guaranteed by the 14th amendment, when its property, or its business, or its occupation is taxed by the State within whose jurisdiction it is, in fact and of right, for and during a definite period of time therein, for a sum more than four times as great as is imposed on domestic corporations of the same class, as is imposed by the Act in question. It has become domesticated, so to speak, for and during that time, the duration of the permit, and the State cannot impose any tax, of any nature whatever, upon such corporation or the property thereof, which is not equal and uniform upon other persons or domestic corporations of the same class. There can be no discrimination against such foreign corporations.

The Supreme court of California in the case of San Francisco vs. Liverpool L. G. Co., 74 Cal., 113, has given us one of the ablest opinions on the power of the State to tax foreign corporations, as follows:

"It is of some interest to note here that the power of the legislature to impose conditions is as absolute over domestic as over foreign corporations. There is no natural right in our citizens to do business in a corporate name. These home corporations act as such purely by grace, and not by right, depending absolutely upon the consent of the State for the enforcement of their contracts, and that assent may be withheld or permitted on such terms as the State shall choose. It may exclude domestic corporations entirely from the State, and, in the absence of express constitutional limitation, permit foreign corporations alone within its borders, or may impose a licence tax upon domestic corporations which is not imposed upon foreign corporations. It may amend or repeal its charters at any time, or impose such new terms and conditions to the right to do business as it may see fit. This absolute power over domestic corporations was never denied or questioned, except as to the right to alter or amend the charters, and that right is clear under our constitution. The whole force and effect of the decisions cited from the federal courts is that foreign corporations are not protected by section 2, article 10, of the federal constitution, and therefore the State may deal with corporations organized in other states as absolutely as with domestic corporations. When the courts of the United States speak of the power of the State to impose conditions upon foreign corporations, they of course have reference to federal limitations. *There is no intimation that such corporations are not, when permitted to do business within a State, entitled to the protection of the laws as fully as citizens.* — This is not a federal question, but those courts have held that a statute of Iowa which provided that any foreign corporation which should remove a cause from a State court to a Federal court should forfeit its right to do business as a corporation within the State,

was void. Barron vs. Burnside, 121 U. S. 186, 7 Sup. Ct. Rep., 931. In that case the statute made it a misdemeanor for anyone to act as agent for any company which had forfeited its right to do business in the State under this Act. Barron was convicted under the statute, and his conviction was declared illegal by the Supreme court, on the ground that no such condition could be imposed. *The effect of this decision is that the permit was valid, but the condition void. Following the logic of this case, the result would seem inevitable that a condition in violation of the State constitution is simply void.* Indeed, this would seem too obvious to require much discussion. The fact that the party against whom a suit is brought to collect a tax may be a foreign corporation, may be very material in determining whether the tax is prohibited by the constitution; but it could not authorize the legislature to exercise a power clearly denied to it in the constitution. Such laws are ultra vires, and as clearly void when they operate upon a foreign corporation as upon a citizen."

In the case of Ward vs. Maryland, 12 Wall., the court states as the cardinal principle of law that "*The Supreme law requires equality of burden, and forbids discrimination in State taxation.*"

In the case of Barbier vs. Connelly, 113 U. S., the court declares that "*no greater burdens should be laid upon one person than are laid upon others in the same calling and condition.*" Such is the definition of the equal protection of the laws, and it matters not whether we apply them to individuals or corporations.

In the case of Pembina Con. S. M. & M. Co. vs. Penn., 125 U. S., the court states that after a foreign corporation has complied with the conditions precedent, and is permitted to do business in the State, "*It would then have the equal protection of the law, so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more.*"

The most recent case in the Supreme court of the United States defining the rights of a corporation, and in defining what is meant by the equal protection of the laws as prescribed by the 14th amendment, is Gulf, C. & S. F. R. R. vs. Ellis, 165 U. S. 666, in which Justice Brewer, voicing the opinion of the court, states:

A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens .... Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes, furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations..... Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to the same consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another."

Under a constitution that required equality and uniformity, in discussing an analogous case, the Supreme court of Massachusetts, says: "But when, as in this case at bar, a tax is assessed on no rule of proportion, but is laid arbitrarily at a certain fixed amount on a certain species of property as respects its ownership, without any regard to other elements which ought to enter into the basis of taxation, then it is clearly unconstitutional." (Oliver vs. Washington Mills, 93 Mass., 279.)

Justice Field, in the Circuit court of California, in the Railroad Tax Cases, 13 Federal Rep., 748, says:

"All the guaranties and safeguards of the constitution for the protection of property possessed by individuals may, therefore, be invoked for the protection of the property of corporations. And as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the 14th amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained. The taxation, therefore, of the property of the defendant upon an assessment of its value, without a deduction of the mortgage thereon, is to that extent invalid."

III.

THIRD ASSIGNMENT OF ERROR.

The court also erred in holding said act to be valid, and in denying plaintiff's said injunction against the defendant as prayed for, as plaintiff would suffer irreparable injury by reason of defendant's wrongful acts in collecting the illegal tax and forfeiting plaintiff's permit to do business in Texas by reason of failure to pay said tax, because said Act not only discriminates against plaintiff, a foreign corporation engaged in interstate commerce, but said Act is repugnant to the commerce clause of the Constitution of the United States, and therefore void (R. 15).

FIRST PROPOSITION.

The facts in this case show that plaintiff is a citizen of a foreign State, and is engaged in interstate commerce and intercourse with the citizens of Texas, in earning and procuring its money or medium of exchange in the State of its domicile, to-wit, Arkansas, and loaning the same to the citizens of Texas on real estate securities of this State, and therefore, said Act in question is obnoxious to the commerce clause of the Constitution of the United States.

Gloucester Ferry Co. vs. Penn., 114 U. S. 158 (L. Ed.)
Bouv. L. D., Definition of Commerce between the States.
Gibbons vs. Ogden, 22 U. S. 69 (L. Ed.)
Altman-Miller & Co., vs. Holder, 68 Fed. Rep. 467.
Asher vs. Texas, 128 U. S. 129 (L. Ed.)
Miller vs. Goodman, 40 S. W. (Tex.) 718.

The Supreme court of the United States in the first of the above cited cases on page 162, defines interstate commerce as follows: "Commerce among the States consists of intercourse and traffic between their citizens ..... The power of congress to regulate also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects therefore, upon which the power may be exerted, are of infinite variety."

IV.

SECOND ASSIGNMENT OF ERROR.

The decree of the court is erroneous in sustaining defendant's demurrer to plaintiff's bill, and in holding the Act in question valid, and in denying plaintiff the right prayed for, because the facts show that plaintiff, a foreign corporation, accepted the invitation of the State of Texas extended to foreign corporations in general by an act of the Twenty-first legislature of the State of Texas, approved April 3, 1889, and for and in consideration of the sum of $200, paid to the State of Texas; in good faith procured from the State of Texas a written contract wherein and whereby it obtained the right to transact its business as a building and loan association within the jurisdiction of Texas for the period of ten years from and after said date, and acquired the right to the equal protection of the laws guaranteed to other persons and corporations of the same class, not only by the Constitution of Texas but by the constitution of the United States, and that thereafter the 25th legislature of the State of Texas, by an Act approved May 15, 1897, (the Act in question) imposed a tax on plaintiff much greater than on domestic corporations of the same class. That said last named act was in contravention of and repugnant to Art. 1, section 10 of the National Constitution, which declares that "No State shall pass any law impairing the obligation of contracts," and therefore the same is null and void, and in consequence thereof defendant has no right to collect the tax imposed by said invalid act or to forfeit plaintiff's charter by reason of failure to pay the same" (R. 15).

FIRST PROPOSITION.

The legislature of Texas by virtue of Art. 1, Sec. 17 of the State constitution, doubtless has the right, under the police power of the State, to revoke the permit of appellant, whenever, in its wisdom, it deems it for the best interest of the people of Texas, but until such permit is in fact revoked in the proper manner, under a proper law prescribing such remedy, by a competent tribunal, such permit is valid, and a binding contract between the State and the corporation; and the same cannot be impaired, so far as appellant's property rights are concerned.

Union P. R. R. Co. vs. United States, 99 U. S. 496.
Ry. Co. vs. Maine, 96 U. S. 836.
Shields vs. Ohio, 95 U. S. 357.
Holyoke vs. Lyman, 82 U. S. 140.
Commonwealth vs. Essex Co., 13 Gray 239.
County of Santa Clara vs. So. P. R. R. Co., 18 Fed. Rep. 406.
Hirn vs. State, 1st O. St. 15.
Detroit vs. Howell Plank Road Co., 43 Mich. 146.

The argument under the third proposition of the first assignment in this brief, on page 28 of this brief, is applicable under the above and foregoing assignment, and, without repeating such argument, we desire the court to consider the same in connection with the last preceding proposition.

The Act of 1889 is a distinct and independent Act regulating and prescribing all the conditions precedent which are necessary for foreign corporations to comply with in order to obtain a permit, and duly qualify to come within the jurisdiction of Texas, and carry on its business in this State. The Act in question, whose validity we attack, in no way whatever, either directly or indirectly refers to, amends or supplements this Act of 1889 The Act of 1893, prescribing a ten dollar franchise tax on all corporations, both domestic and foreign, was of course on the statute books when plaintiff came within the jurisdiction of Texas, on July 24, 1896. Said tax was a mere license, and was not intended to raise revenue, as the fee was nominal according to the doctrine laid down by Mr. Cooley. *The penalty prescribed by this Act for failure to pay the $10, was that such fact would, ipso facto, forfeit the charter of the foreign corporation,* which of course was preposterous, as this State has no power whatever to forfeit the charter of appellant, it being a citizen and inhabitant of the State of Arkansas. The only right the State would have under the Act of 1893, in the event appellant or any other foreign corporation failed to pay the $10 license tax, would be for the State to sue such corporation, and enforce the payment of the $10 in that manner. This license was equal and uniform as to all corporations, both foreign and domestic.

The Act in question, approved May 15, 1897, was intended solely to impose taxes on the various foreign corporations mentioned therein, for the purpose of raising revenue to support the government. It was not intended to impose a further license or license tax upon foreign corporations already in the State in order to enable them to carry on their business thereafter, but the object was simply to raise revenue. This Act became effective on May 15, 1897, and all corporations doing business in the State on that date were not required to pay the tax then, on said last named date, but were required to pay the tax at the end of the first year, to wit, on or before May 1, 1898: hence, it could in no manner be construed as a license and as a condition precedent to be complied with before the corporation, already within the State

with its permit, could come within the jurisdiction of the State. The permit, then, that appellant had at the time of the passage of the Act in question, is in the nature of a charter from the State. It is a contract between the State and the corporation, and is of equal dignity and importance with that of a charter granted by the State. Either the charter or the permit could be revoked by the State in the proper manner. The permit and charter grant to the corporation certain franchises which enable the corporation to carry on the business prescribed by such permit or charter. The permit of the foreign corporation has become a contract coupled with an interest after the corporation came within the State and invested its means and brought its property within the jurisdiction of the State.

All the law then, applicable to the impairment of the charter contract of the corporation is applicable to the permit contract of the foreign corporation. Is it not a fact, then, that the Act imposing a tax upon appellant more than four times as great as on domestic corporations of the same class, is an impairment of appellant's contract.

The State has not forfeited appellant's permit. It has passed no law for the purpose of revoking the permit of appellant. The permit, then, is valid and binding until it is revoked in the proper manner by the State.

Chief Justice Shaw, in the case of Commonwealth vs. Proprietors, 2nd Gray, 339, says;

"The rule to be extracted is this: that when under power in a charter, rights have been acquired and become vested, no amendments or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted."

In the case of Shields vs. Ohio, 95 U. S., 357, the court uses these words:

"The power of alteration and amendment (of charters) is not without limit. The alterations must be reasonable; they must be made in good faith; they must be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendments or alteration. Beyond the sphere of the reserved powers the vested rights or property of corporations in such cases are surrounded by the same restrictions, and are as inviolable as in other cases."

Voicing the opinion of the Supreme court of Michigan in the case of City of Detroit vs. Howell Plank Road Co., 43 Mich., 146, Justice Cooley says:

"But for the provision in the constitution of the United States which forbids impairing the obligation of contracts, and power to amend and repeal corporate charters, would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the power which it would then possess. It might, therefore, do what it would be admissa-

ble for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the 'law of the land.' Even municipal corporations, though their charters are in no sense contracts, are protected by the constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it."

V.

FIFTH ASSIGNMENT OF ERROR,

The court erred in sustaining the validity of the Act of the legislature in question, approved May 15, 1897, and in denying the relief prayed for, because said Act confers upon the Secretary of State, an executive officer of the State, the power to declare the permit of any foreign corporation forfeited in any event by reason of failure to pay the tax in question without notice or judicial trial; and deprives plaintiff of the right to have such facts, constituting cause for forfeiture of its permit and right to do business in Texas, judicially ascertained according to the laws of the land; and of the right to have the question of forfeiture of its permit inquired into and determined by judicial authority; and hence said Act is repugnant to the 14th amendment to the National Constitution which provides that "No State shall deprive any person of life, liberty or property without due process of law", and therefore said Act is void (R. 17).

FIRST PROPOSITION.

Due process of law is intended to secure the person from the arbitrary exercise of the power of government.

Smyth et al vs. Ames et al; opinion by U. S. Supreme court, March 7, 1898.

Denn vs. Hoboken Land & Improvement Co., 59 U. S., 374 (L. Ed.)

Westervelt vs Gregg, 12 N. Y. 209.

Stewart vs. Palmer, 74 N. Y. 195.

Railroad Tax Cases, 13 Fed. Rep. 722.

1st Beach on Private Corporations, Section 45.

Three elements — a competent tribunal, knowledge given to the person whose rights are affected of the charge against him,

and an opportunity given to the accused to defend, are of necessity inherent in "due process of law." The foreign corporation, by the Act in question can and will be deprived of its franchises and valuable property rights, procured from the State in good faith, for a valuable consideration—without a judicial tribunal, without notice and without an opportunity to defend itself under any circumstances.

"The forfeiture of corporate charters is a penalty to be imposed by the judiciary alone. Under no circumstances can the legislature declare a forfeiture. Such an usurpation of judicial powers would be hostile to one of the fundamental principles of the American system..... The legislature cannot strengthen an enactment of forfeiture by reciting therein facts which would constitute a ground for a judicial declaration of forfeiture."

1st Beach on Private Corporations, Section 45, and the great number of authorities there cited.

The Supreme court of the United States in the case of Barron vs. Burnside, 121 U. S. 915, materially modifies the doctrine laid down in Doyle vs. Ins. Co., 94 U. S., in regard to permits issued to a foreign corporation, and says:

"The point of the decision seems to have been, that as the State had granted the license, its officers would not be restrained by injunction by a court of the U. S. from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in Insurance Co. vs. Morse, must be regarded as not in judgment..... As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void."

SECOND PROPOSITION.

Notice and opportunity to be heard are absolutely essential before a person can be deprived of his rights or of his property by the government.

Chicago & St. Paul Ry. vs. Minnesota, 134 U. S. 970 (L. Ed.)
Henderson vs. Wickham, 92 U. S. 543, (L. Ed.)
Neil vs. Delaware, 103 U. S. 567 (L. Ed.)
Hurtado vs. California, 110 U. S. 230 (L. Ed.)
Campbell vs. Dwiggins, 83 Ind. 482.
Ireland vs. Rochester, 51 Barb. 414.
Patton vs. Green, 13 Cal. 325.
Ragan vs. Farmer's Loan & Trust Co., 154 U. S. 1054 (L. Ed.)

The Act in question delegates to the Secretary of State the power to ascertain and to pass upon all facts which might consti-

tute a cause for the forfeiture of the franchises and the permit of the corporation, under any and all circumstances; it matters not whether the corporation is engaged in interstate commerce or some other business, which might exempt it from paying the tax. There might be a condition of facts under some circumstances which equity would excuse the corporation from payment of the tax, as required by the strict letter of the law. The amount of the tax to be paid in each instance must be ascertained, and there is ample room for controversy over this fact.

The Act excludes all possibility on the part of the Secretary of a mistake in ascertaining the amount of the tax, or the facts constituting cause for forfeiture, and the corporation has no right of appeal from the decree of the Secretary. His edict in depriving corporations of their property is as inflexible as the laws of the Medes and Persians; and the corporation is deprived of the right of a hearing and of the right to have a judicial tribunal to pass upon such facts, which may or may not constitute cause for a forfeiture of its valuable rights or franchises, and, in consequence thereof, is also deprived of the right to in any way avert irreparable injury, which must necessarily follow in each case where such a forfeiture is made as prescribed by said Act.

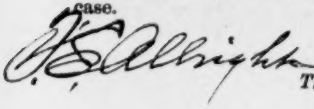
The corporation, then, is deprived of its property without due process of law, as guaranteed by the Supreme law of the land. The Act is, therefore, necessarily repugnant to the Supreme law, and therefore void.

We cannot find in the law books more appropriate language to close this brief than that used by Justice Harlan in voicing the opinion of the most learned tribunal in our land, in the celebrated case of Smyth et al vs. Ames et al, delivered on March 7, 1898, in which he says:

"No one, we take it, will contend that a State enactment is in harmony with that law simply because the legislature of the State has declared such to be the case; for that would make the State legislature the final judge of the validity of its enactment, although the constitution of the United States and the laws made in pursuance thereof are the Supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. Art VI. The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law; is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the Supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void

all legislation that is clearly repugnant to the Supreme law of the land."

We most respectfully ask that this cause be reversed and that an injunction be granted as prayed for, and for such other and further relief as appellant may be entitled to under the facts of this case.



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